
In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF FOR THE AMERICAN TRUCKING
ASSOCIATIONS AS AMICUS CURIAE IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

The amicus curiae will address the following question:

Whether an order to reinstate with backpay an employee determined by an Administrative Law Judge to have testified falsely as to a material issue during an unfair labor practice hearing exceeded the National Labor Relations Board's statutory authority.

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INTEREST OF THE AMICUS CURIAE

The American Trucking Associations, Inc. ("ATA"), a not-for-profit corporation, is a trade association of motor carriers, state trucking associations, and national trucking conferences, created to promote and protect the interests of the trucking industry. Directly and through its affiliated organizations, ATA represents over 30,000 for-hire motor carriers, as well as private carriers, leasing companies, and trucking suppliers. Nationwide, the trucking industry employs approximately 7,800,000 men and women. ATA regularly advocates the trucking industry's common interests before this Court and other courts.¹

¹ The written consents of the parties to the filing of this brief have been filed with the Clerk.

As participants in the National Labor Relations Board's adjudicative processes, ATA's members have a strong interest in the integrity and reliability of Board decisionmaking. This case raises particular concerns for ATA and its membership. The Tenth Circuit enforced an NLRB order that will have the effect of encouraging employees to perjure themselves in unfair labor practice hearings to increase their chances of a favorable ruling.

ATA believes that just and reliable adjudication of disputes between employers and employees, which is the cornerstone of labor relations under the National Labor Relations Act (the "Act" or "NLRA"), requires that those who abuse the Board's unfair labor practice proceedings by lying as to material issues should forfeit remedies that would award them personal benefits, such as reinstatement and backpay. Only in that way can employers have reasonable assurance that the deck is not stacked against them in unfair labor practice proceedings by perjured testimony encouraged by the Board's remedial practices. ATA therefore believes that the court of appeals' decision should be reversed.

STATEMENT

1. Petitioner ABF Freight System, Inc., an interstate trucking company, employed Michael Manso as a dockworker at its terminal in Albuquerque, New Mexico. Manso was a "preferential casual" dockworker, and as such had limited rights under a collective bargaining agreement between ABF and the International Brotherhood of Teamsters Local 492 (the "Union"). Pet. App. A7-A8.

In 1988, pursuant to its interpretation of the labor contract, ABF discharged Manso and other preferential casual workers, but offered them reinstatement as dockworkers if they would waive preferential casual status. The Union filed a grievance, and Manso filed an unfair labor practice charge. A third-stage grievance panel ordered ABF to reinstate the discharged dockworkers as preferential casuals without backpay; ABF complied. Pet. App. A8; B9-

B10; B14². After Manso returned to work in April 1989, ABF supervisors told him that he should be careful because the company "was after him." *Id.* at B46.

In June 1989, ABF discharged Manso under its disciplinary policy for twice failing to respond to a telephone call summoning him to work. Pet. App. B15. Manso filed a grievance. There was evidence at the grievance hearing that on the second occasion when Manso did not answer a work call, the employee who placed the call believed he might have misdialled, but had been denied permission to redial by a supervisor. On the basis of the supervisors' warnings to Manso and the refusal to allow the second work call to be redialed, the grievance panel found the discharge of Manso to be in violation of contract and ordered ABF to reinstate him without backpay. *Id.* at A9; B15; B47.

2. On August 11, 1989, Manso arrived late for work and was given a disciplinary warning letter. Pet. App. B16; B47. The employee classification of "preferential casuals" was a new one, and this was the first occasion on which a preferential casual had been late to work; thus, after consultation, ABF managers formulated a tardiness policy for this group of employees. The policy provided that a first unexcused tardiness would result in a disciplinary warning letter; a second would result in termination. *Id.* at B17.

A few days later, on August 17, Manso again arrived at work late. Questioned by his supervisors about why he was late, Manso claimed that his car had broken down on the freeway on the way to work. He walked to a pay phone and called the ABF terminal, and then his wife. His wife picked him up in her car. Manso asserted that he then drove with his wife towards the terminal, leaving his own car on the side of the freeway. On the way to the

² The Board subsequently held, in an action consolidated with the present one, that ABF's termination of preferential casuals had been pursuant to a reasonable interpretation of the contract and had not violated the NLRA. Pet. App. A12-A13; B13.

terminal, he was pulled over for speeding by Bernalillo County deputy sheriff Smith. Pet. App. B16; B47-B48; ALJ Tr. 126-130. When asked what time he had left home, Manso became evasive and refused to answer. Pet. App. B48.³

ABF supervisors attempted to verify Manso's story. The plant manager drove to the spot on the freeway where Manso claimed to have left his car; it was not there. Supervisors also spoke to Officer Smith. They concluded that Manso's explanation was false and his tardiness unexcused. The company then discharged Manso. Pet. App. B48; ALJ Tr. 451-454.

3. Manso filed a grievance contesting his discharge and repeated his "excuse" at the first-step grievance hearing. After Manso's termination was upheld, he filed an unfair labor practice charge against ABF. Pet. App. A10.

At the hearing before the Administrative Law Judge, Manso retold — this time under oath — his story that his August 17th tardiness had been caused by car trouble. Manso told the ALJ that on his way to work that morning his car overheated and "got so hot it stopped." ALJ Tr. 129. Manso "just left [his car] on the side of the road." *Id.* at 134. He "walked to the nearest pay phone," "talked to ABF," then "called [his] wife." She "came and picked [him] up from the pay phone [he] was at." *Id.* at 127. When his wife arrived, "[s]he got in the passenger side; [Manso] drove the car to work." *Id.* at 134; see also *id.* at 505. On the

³ This account of what Manso told his supervisors is drawn from the ALJ's opinion and is based upon Manso's own account of events. ABF supervisor Ed Fultz recalled that Manso had given his supervisors a somewhat different version of this story, one that included no mention that he had been stopped for speeding. According to Fultz, Manso had said that after the breakdown, Officer Smith stopped to offer his assistance but Manso refused it. ALJ Tr. 447-448. This is the explanation set out in the Employee Discussion Report that ABF personnel prepared at the time of the incident. *Id.* at 447.

way, Manso was pulled over for speeding by Officer Smith. *Id.* at 128-130.

Officer Smith contradicted Manso's story. Smith testified that he had followed Manso for two or three miles, at speeds of 85 to 90 miles an hour, then stopped him for speeding. ALJ Tr. 511. When he did so, "[t]here was no woman in the car" with Manso; "[h]e was by himself." The only excuse Manso gave Smith for speeding was that "he was late for work." *Id.* at 513. Manso did not tell Officer Smith about any car trouble. *Id.* at 512.

The ALJ credited Smith's testimony. He concluded that Manso had been "lying to [ABF] when he reported that his car had overheated and that he was late for work because of car trouble" — precisely the explanation Manso had repeated to the ALJ under oath. The ALJ ruled that ABF fired Manso because "there had been an element of dishonesty in Manso's entire course of conduct in this matter." ABF had thus discharged Manso for cause, not in reprisal for filing an unfair labor practice charge and a grievance following his earlier dismissals. Pet. App. B58-B59.

4. The NLRB reversed. The Board first determined that ABF had not "treated Manso's dishonesty in and of itself as an independent basis for discharge." Pet. App. B18. Rather, Manso's lie established "that he did not have a legitimate excuse for the August 17 lateness." *Id.* at B16. It was this second unexcused tardiness, rather than Manso's dishonesty, that ABF cited when it fired him. *Id.* at B18.

The Board then found that ABF had treated Manso discriminatorily when it applied its new lateness policy retroactively to his August 11 tardiness. *Id.* at B20. It concluded that the General Counsel had made a prima facie case that ABF discriminated against Manso in this way in order to retaliate against him for bringing an unfair labor practice charge and a grievance; and that ABF had not met its burden of proof (under the standard for mixed motive cases established in *Wright Line*, 251 NLRB 1083 (1980), enforcement granted, 662 F.2d 899 (1st Cir. 1981)) to show that the company would have discharged Manso for tardiness even if

Manso had not engaged in activities protected by the Act. The Board ordered ABF to reinstate Manso with backpay. *Id.* at B18-B21.

5. The Tenth Circuit enforced the Board's order. Because Manso's dishonesty, tardiness, and antiunion animus all contributed to ABF's discharge decision, the court also analyzed this case as one involving mixed motives. It held that ABF thus bore the burden of showing that it would have discharged Manso absent any protected union activity, and determined that there was substantial evidence supporting the Board's decision that ABF had not met its burden. Pet. App. A16, A18.

Although neither the Board nor the Tenth Circuit questioned the ALJ's finding that Manso had lied to his employer and again under oath at the administrative hearing, the court of appeals nevertheless rejected ABF's argument that granting reinstatement and backpay to Manso would violate the policies of the Act. Pet. App. A18-A19. Without addressing the fact that Manso had perjured himself during administrative proceedings on his unfair labor practice charge, the court of appeals stated that "Manso's *original* misrepresentation was made to his employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus," and that in those circumstances the Board had discretion to order Manso reinstated with backpay. *Id.* at A19 (emphasis added). The court therefore granted the Board's petition for enforcement. *Id.* at 20.

ARGUMENT

In ordering petitioner ABF to reinstate Michael Manso with full backpay after he lied under oath as to a highly material issue during proceedings upon his unfair labor practice charge, the NLRB exceeded its statutory authority. The Board undoubtedly has broad discretion to craft appropriate remedies for unfair labor practices. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). But its discretion is not unlimited. Congress empowered the Board, upon finding that an employer committed an unfair labor practice, to issue "an order requiring [the employer] to cease

and desist * * *, and to take such affirmative action including reinstatement of employees with or without back pay, *as will effectuate the policies of this [Act].*" NLRA § 10(c), 29 U.S.C. § 160(c) (emphasis added). In consequence, the Board lacks the statutory power to order remedies that cannot "fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). See also, *e.g.*, *NLRB v. Apico Inns of California, Inc.*, 512 F.2d 1171, 1175 (9th Cir. 1975) ("The Board's discretion is not * * * absolute * * *. No reinstatement should be ordered if the policies of the Act are not furthered by such an order").

The Board's reinstatement and backpay order in this case is wholly inconsistent with maintaining the reliability and integrity of decisionmaking procedures under the NLRA, and also with orderly collective bargaining and peaceful labor relations. Accordingly, because the Tenth Circuit's judgment enforcing that order is at odds with the goals of the NLRA, it should be reversed.

I. AN EMPLOYEE WHO ABUSES THE BOARD'S ADJUDICATIVE PROCESS BY LYING UNDER OATH AS TO A MATERIAL ISSUE DURING AN UNFAIR LABOR PRACTICE HEARING IS DISQUALIFIED FROM OBTAINING REMEDIES OF REINSTATEMENT OR BACKPAY

By ordering the reinstatement with backpay of an employee who had perjured himself as to facts material to the issue before the ALJ in unfair labor practice proceedings, the Board in this case condoned "a cynical usurpation of [its own] factfinding process." *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105, 1110 (8th Cir. 1992). Like the Eighth Circuit in *Precision Window*, this Court should "refus[e] to take the Board's processes as lightly as the Board apparently does." *Ibid.* Rather, this Court should make clear that the Board's remedial authority does not extend to ordering affirmative relief for an employee who has lied under oath about a material issue. Because the Board's order encourages deceit and undermines the integrity of the Board's procedures, it

is inconsistent with the policies of the NLRA to promote labor peace through collective bargaining, which depend for their implementation on the *accurate* adjudication of unfair labor practice and other disputes. See *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) ("The purpose of the Act was to obtain 'uniform application' of its substantive rules").

A. Manso Lied Under Oath As To A Material Issue During The Unfair Labor Practice Proceedings

There is no dispute that Michael Manso knowingly was "lying * * * when he reported that his car had overheated and that he was late for work because of car trouble." Pet. App. B59. Initially, Manso told this lie to his supervisors at ABF. Having been warned by them that an unexcused tardiness would be grounds for dismissal (*id.* at A10), he simply invented an excuse. ABF detected Manso's lie and discharged him, saying that this action was being taken pursuant to a company policy that prohibited preferential casual dockworkers from being late to work on more than one occasion without good reason. *Id.* at B18.

Manso's lies did not stop there, however. When Manso grieved his discharge, he repeated his concocted story — first to the grievance panel (Pet. App. A10), and then, after he filed an unfair labor practice charge, under oath to the Administrative Law Judge. ALJ Tr. 127-134, 505. In the unfair labor practice proceedings, ABF was able to call as a rebuttal witness a police officer who explained that when he pulled Manso over for speeding, Manso was alone in the car. This evidence contradicted Manso's sworn testimony that his wife picked him up to take him to work after his car broke down, and exposed his false testimony. *Id.* at 511; Pet. App. B59.

Manso's perjured testimony before the ALJ was indisputably material to the unfair labor practice charge, and neither the Board nor the Tenth Circuit suggested otherwise. His representation that he had good reason for being late to work — had it been credited — could have provided an important ground for ruling that his dismissal constituted an unfair labor practice. It would have estab-

lished that when ABF fired Manso, it violated its own policy that only an unexcused tardiness should count against a preferential casual employee. This would certainly have been regarded as strong evidence that ABF's motives in firing Manso were illegitimate. Cf. Pet. App. B15 n.11. Manso's lie therefore lay at the very heart of the issue before the ALJ.

Manso's lie was no less material merely because it was exposed at the hearing and because the Board's decision that ABF committed an unfair labor practice when it fired Manso ultimately rested on other facts. A false statement going to an issue in a case does not suddenly become immaterial because the lie is subsequently discovered and therefore plays no part in the decision reached. Cf. *United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983) (for purposes of 18 U.S.C. § 1623, which criminalizes "false material declarations" made under oath before a court or grand jury, "[t]he test for materiality is whether the false testimony was capable of influencing the tribunal on the issue before it"); *United States v. Berardi*, 629 F.2d 723, 728 (2d Cir. 1980) (under § 1623, a false statement under oath that hinders inquiry is material, and the effect of the statement "is measured in terms of potentiality, rather than probability * * * . It is of no consequence that the information sought would be merely cumulative, [or] that the response was believed by the [tribunal] to be perjurious at the time it was uttered"). Had Manso's lie *not* been discovered, his testimony might well have formed a basis for the Board's decision. For that reason, it was clearly material.

B. Ordering Reinstatement With Backpay Of An Employee Who Has Lied Under Oath As To A Material Matter Does Not Effectuate The Purposes Of The NLRA

Because Manso's lie under oath was highly material to the question before the ALJ, it threatened "to undermine the Board's unfair labor practice proceedings" and amounted to a serious "abuse of the Board's processes." *Service Garage, Inc.*, 256 NLRB 931, 931 (1981), enforcement refused on other grounds,

668 F.2d 247 (6th Cir. 1982). The Board completely ignored this conduct. In requiring ABF to reinstate Manso with backpay, the Board gave Manso the very same relief that he would have obtained had he not tried to perjure his way to a favorable ruling. By so doing, the Board "pervert[ed] the purposes of the [NLRA]" (*Virginia Elec. & Power Co.*, 319 U.S. at 541) and forfeited the deference usually due its remedial orders. *Liton Financial Printing Div. v. NLRB*, 111 S. Ct. 2215, 2223 (1991) (no special deference is owed to the Board when its "remedial discussion is not grounded in terms of any need [for the particular remedy] in order 'to effectuate the policies of the Act'").

The effect of the Board's reinstatement and backpay order is to encourage complaining witnesses to manipulate the Board's factfinding process by giving false testimony under oath. Under the Board's approach, an employee appears to have nothing to lose by lying during unfair labor practice proceedings — but may benefit if the lies are believed. In thus skewing an employee's incentives away from telling the truth, the Board has created "a very real barrier to the effectuation of the policies of the Act," which can be achieved only through reliable, accurate Board decisionmaking. *Virginia Elec. & Power Co.*, 319 U.S. at 540-541. The Board's statutory obligation is rather to "depriv[e] [the employee of the] advantages [he sought to] accru[e] from [his] particular method of subverting the Act," by denying the affirmative remedies of reinstatement and backpay. *Id.* at 541. See, e.g., *Iowa Beef Packers, Inc. v. NLRB*, 331 F.2d 176, 185 (8th Cir. 1964) (employee's material false testimony at a hearing on his unfair labor practice charge required "forfeiture of [the reinstatement] remedy * * * to serve the policy of the Act"); *NLRB v. Magnusen*, 523 F.2d 643, 646 (9th Cir. 1975) (reinstatement with backpay for an employee who "severely impeded the vital fact-finding process by repeated lying" fails to "effectuate the policies of the Act"); *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980) ("[T]he purposes and policies of the Act do not justify full reinstatement of an employee * * * whose untruthful testimony abused the process he now claims should grant him

full relief"); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964).

ATA urges this Court to adopt a bright-line and readily applied standard that would permit the Board to remedy unfair labor practices while barring it from ordering affirmative relief that serves to undercut its own factfinding procedures. Such a test, we believe, would focus on the employee's false testimony in the context of the particular adjudicative process. It would require that when an employee is found to have lied under oath during administrative proceedings against the employer, his false testimony should be analyzed in light of the issues before the tribunal. If the employee's lies were material to those issues and hence threatened to undermine the adjudicative process, the employee must forfeit those fruits of the process he abused that would redound to his personal benefit. Thus, the employee would be barred from obtaining reinstatement or backpay. The NLRB would remain free, however, to enforce the Act and its prohibitions by imposing sanctions against the employer that do not reward that employee's false testimony, such as issuing a cease and desist order, requiring the employer to post notices of the violation, and ordering reinstatement and backpay for employees who did not testify falsely.

Applied in this case, this standard mandates reversal. Manso's false testimony was highly relevant to the issue before the Board in the unfair labor practice proceedings, and therefore amounted to an abuse of the Board's factfinding process. In these circumstances, the Board lacks authority, under the Act, to reward Manso with affirmative remedies that benefit him personally. It may, however — and did (Pet. App. B27-B28; B65-B68) — enforce ABF's obligations by ordering it to cease and desist from discriminatory actions based on union activity and to post notices.

The Tenth Circuit erred because it focussed not on Manso's material lies to the ALJ, but on the lies Manso told to his employer. The court of appeals excused Manso's repetition under oath of an "original misrepresentation" that had been "made to his

employer in an attempt to avoid being fired under a policy the application of which the Board found to be the result of antiunion animus." Pet. App. A19. The court then purported to find a distinction between these circumstances and a case in which "the employee lied *in the first instance* during the administrative hearing" as to a material issue. *Ibid.* (emphasis added).

To articulate this distinction is to refute it. Whatever justification Manso may originally have had for lying to his supervisors about why he was late to work, it did not apply once he was testifying before a neutral tribunal adjudicating his unfair labor practice charge. Manso had absolutely no justification for repeating his lie under oath to the ALJ. He could have told the truth, explaining why he had felt compelled to lie to his employer. Instead, he chose to try to hoodwink the ALJ into believing that he had a valid excuse for his tardiness and for that reason should not have been discharged under ABF's lateness policy. It cannot conceivably be material to the proper treatment of Manso's lie, repeated under oath and calculated to interfere with the tribunal's decisionmaking, that his earlier misrepresentation to ABF might be explicable as a reaction to perceived unfairness on the part of the employer. Because Manso's false testimony undermined the Board's factfinding process, his reinstatement with backpay was inconsistent with the purposes of the NLRA, and the Tenth Circuit's judgment should be reversed.

II. THE BOARD MAY NOT ORDER AN EMPLOYER TO REINSTATE AN EMPLOYEE WHOSE POST-DISCHARGE FALSE TESTIMONY WOULD HAVE WARRANTED DISCHARGE

ATA submits that there is an alternative reason why the Board's grant of full backpay and reinstatement to Manso cannot stand. Even an employer who has unquestionably violated the Act may not properly be forced to reinstate and an employee who engaged in serious misconduct subsequent to discharge (or whose previous misconduct comes to light after discharge), where that misconduct would justify termination. *E.g., Alumbaugh Coal*

Corp. v. NLRB, 635 F.2d 1380, 1384-86 (8th Cir. 1980); *Big Three Industrial Gas & Equip. Co.*, 212 NLRB 800, 803 (1974), enforcement granted, 512 F.2d 1404 (5th Cir. 1975). *Cf., e.g., Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992) (Title VII). In such cases, the proper remedy might include partial backpay (up to the time the employee would have been terminated for the subsequent misconduct), but would not include reinstatement.

Manso's lies before the administrative law judge were told to deceive the ALJ, were directed at ABF, and were intended to influence the outcome of Manso's unfair labor practice charge. They were inexcusable. They were not reckless or impulsive remarks in response to unexpected questions, or misleading answers to ambiguous queries, or slanted assertions of opinion, or statements peripheral to the issue at the hearing. *Cf. Precision Window Mfg.*, 963 F.2d at 1108 (leaving "some leeway" for "impulsive" post-discharge misconduct); *Big Three Industrial Gas & Equip. Co.*, 212 NLRB at 800, 803 (affirming ruling of the ALJ, who held that the remedies of reinstatement and backpay are appropriate where the employer does not demonstrate that the employee's testimony was false, "that it was uttered with intent to deceive, and that it related to a substantial issue"); *Arvey Paper & Office Products*, 1992 NLRB LEXIS 1432, at *73 (ALJ decision Dec. 11, 1992) (reinstatement and backpay are permissible remedies where the discredited portions of an employee's testimony were immaterial). Rather, Manso's story was an elaborate and premeditated fabrication of events fundamental to the unfair labor practice proceeding. Whatever ABF's original reasons for discharging Manso, his false testimony provided a more than sufficient justification for ABF, the intended victim, to have discharged him at the time of this new and "independent wrong" against the company. *Alumbaugh Coal*, 635 F.2d at 1385. See also *Precision Window Mfg.*, 963 F.2d at 1108 ("[A]n employee is not free to engage in wanton conduct following an unlawful discharge and then hide behind the Act's protections").

Requiring reinstatement with full backpay of a person who has committed such a serious post-discharge wrong penalizes the employer and continues to penalize it indefinitely (*NLRB v. Breitling*, 378 F.2d 663, 664 (10th Cir. 1967)), while at the same time granting a windfall to the employee whose misconduct provided an independent ground for dismissal. This result is squarely at odds with the goals of the NLRA to encourage collective bargaining and promote peaceful labor relations. *NLRB v. Local Union No. 1229*, 346 U.S. 464, 472 (1953) (the "Act seeks to strengthen * * * that cooperation * * * and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise"). The NLRA's purposes cannot conceivably be advanced by forcing upon the employer a worker whom the employer would have ample grounds to fire because of his post-discharge false testimony against the employer. On the contrary, reinstatement in such a case will result in antagonistic work relations. See *Alumbaugh Coal*, 635 F.2d at 1385-1386 (declining to enforce reinstatement and backpay order where employee's post-discharge misconduct had "adversely affected his employer"); *Coca-Cola Bottling Co.*, 333 F.2d at 185 (holding that an employee's "misconduct exemplified by his pattern of falsification and deceit during his employment with the Company, climaxed by his false testimony at [an administrative] hearing, * * * disqualifies him from reinstatement"; "[t]o force him upon the Company under such circumstances would bring about an impossible situation"); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 366 (5th Cir. 1990) (courts are "reluctan[t] to force reinstatement where to do so would condone behavior that a reasonable employer would not wish in its workplace").

In order to effectuate the goals of the Act, the remedy for unlawful termination should therefore be circumscribed where an employee has engaged in material post-discharge false testimony which is an independent ground for discharge. In such cases, reinstatement should not be available, and backpay should be limited to that amount accruing before the employer became aware that the employee had committed false testimony and thus had

lance Service, 292 NLRB 835, 835 n.7 (1989) (misconduct during the backpay period will cut off backpay at the time the employer acquires knowledge of it).⁴

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1993

⁴ This Court recently granted certiorari in a case in which the Sixth Circuit held that a Title VII plaintiff is barred from receiving any backpay where the employer, subsequent to unlawfully terminating the employee, discovers evidence that the employee lied on her employment application. *Milligan-Jensen v. Michigan Tech. University*, No. 92-1214 (cert. granted June 21, 1993). While an affirmance in *Milligan-Jensen* would suggest that reversal may be appropriate here — for Manso's perjury was a far more serious form of misrepresentation than that which would have justified termination of the employee in *Milligan-Jensen* — our argument here concerns the remedial rules necessary to effectuate an entirely different statutory scheme, and this Court's decision in *Milligan-Jensen* will not be controlling.